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In the Supreme Court of the United States

OCTOBER TERM 1931.

Nos. 200-201.

HARRY M. BLACKMER,
Petitioner,

vs.

UNITED STATES,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRITS OF CERTIORARI
To the Court of Appeals of the District of Columbia.

LEO A. ROVER,
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District of Columbia,
Washington, D. C.,

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Attorneys for Respondent.

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To the Court of Appeals of the District of Columbia.

To the Honorable, Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The United States, the respondent herein, submits this brief in opposition to the petitions for writs of certiorari.

Opinion of the Supreme Court of the District of Columbia Printed in Record, No. 5131, at pp. 20-33, 58-65; in Record, No. 5132, at pp. 42-49.

Opinion of the Court of Appeals of the District of Columbia Printed in Vol. 49 Fed. (2d) 523.

STATEMENT OF THE CASE.

The petitioner, a citizen of the United States, was tried in the Supreme Court of the District of Columbia in two cases for contempt, No. 16 and No. 18, in failing to respond to subpoenas issued out of said court and directed to

consuls of the United States then in France to be served upon the petitioner, Harry M. Blackmer, then residing in Paris. The subpoenas were issued under the Act of July 3, 1926, commonly known as the Walsh Act. All proceedings herein were taken under the said Act. The late Mr. Justice Siddons tried the cases and sentenced Blackmer to pay a fine of $30,000 and costs in each case.

An appeal was taken by him to the Court of Appeals of the District of Columbia. The cases in said court are designated respectively as No. 5131 and No. 5132.

On April 6, 1931, the Court of Appeals of the District of Columbia, Mr. Justice Robb delivering the opinion, affirmed the judgments and sentences of the trial court.

Case No. 43,324, United States v. Harry F. Sinclair and Albert B. Fall, indictment for conspiracy to defraud, was assigned for trial on October 17, 1927.

PROCEDURE IN NO. 5131.

On May 13, 1927, counsel, representing the government, filed their petition, signed by them and sworn to by Owen J. Roberts, praying for the issuance of subpoenas under the Act of July 3, 1926, for Harry M. Blackmer and another to attend the trial in Washington. The United States Attorney, Honorable Peyton Gordon, and Special Assistants to the Attorney General, Owen J. Roberts and Atlee Pomerene, set out in said petition that the attendance of said witnesses was vital and important to the United States; that they had knowledge and information with regard to certain important facts which the United States desired to prove in said case and that their testimony as to said facts would be material in connection with the establishment, not only of the conspiracy charge between the said defendants, but in connection with certain overt acts done in pursuance thereof, and particularly they set out that said witnesses could testify to facts concerning

the persons, who, in the latter part of the year 1921, were the stockholders in the Continental Trading Company Limited, and with regard to the distribution by that corporation to its stockholders of certain 3½% Liberty Bonds, which were subsequently delivered by the defendant, Harry F. Sinclair, to his co-defendant, Albert B. Fall. (R. 5131, pp. 1-3)

The court issued an order granting said subpoenas, addressed to certain consuls of the United States in France, to be served upon said witnesses for their appearance in Criminal Court No. 2 in Washington on the 17th day of October 1927, and requiring that the said witnesses should each be tendered Five Hundred Dollars ($500.00) for necessary expenses in traveling to Washington and return and attending the court. Said subpoenas were in the usual form, from "The President of the United States to H. M. Blackmer," commanding him to attend said court on October 17, 1927, at 10 o'clock A. M., to testify on behalf of the United States and "not depart the court without leave of the court or District Attorney." (R. 5131, p. 7)

Two subpoenas were served, one by George Orr, consul of the United States at Paris, directing him to serve the subpoena and make return thereof to the court. His return (R. 5131, p. 8) shows that the witness Blackmer was served personally, on the 27th day of May 1927, at his usual place of residence, and the original of said subpoena left in his hands, and the said consul tendered him Five Hundred Dollars ($500.00) for traveling expenses, which he refused. On June 7, 1927, a similar subpoena was served by Raymond Davis, consul of the United States at Paris, upon Blackmer personally by reading the same to him and leaving a duplicate copy with him at Paris. He also tendered to the said Blackmer Five Hundred Dollars ($500.00) in currency, which tender Blackmer refused. (R. 5131, pp. 9-10)

Blackmer failed to appear in court at the time required. His name was called by the Clerk. Counsel representing him appeared for the purpose of explaining to the court why Blackmer was not present. The record shows that he was not in court in response to the subpoena and would not be. (R. 5131, p. 11)

On November 4, 1927, counsel for the government filed their petition for a rule in contempt alleging in substance that on May 13, 1927, they presented their petition to the trial judge for a subpoena for H. M. Blackmer, a citizen of the United States, temporarily sojourning in France, to appear in court as a witness on October 17, 1927; that the said order was issued, commanding him to appear at 10 o'clock, on said day, in court at Washington, to testify on behalf of the United States in Criminal Case No. 43,324, and "not depart the court without leave of the court or District Attorney."

The court further ordered that the consul should tender Five Hundred Dollars ($500.00) for his necessary expenses in traveling to and from the place in which the court sat and his expenses in attendance thereat; that on the 27th of May, 1927, the consul of the United States at Paris, France, served a subpoena on the said Blackmer by exhibiting the same to him and delivering to him personally a copy thereof and tendering to him the sum of Five Hundred Dollars ($500.00). On the 7th day of June 1927 a similar subpoena was served upon him personally by another consul of the United States by exhibiting and reading same to him, leaving a copy with him and tendering him Five Hundred Dollars ($500.00) and due return of said subpoena was made to the Clerk of the trial court and at the time stated, the witness was called by the Clerk in open court. He did not respond and neglected and refused to appear. Blackmer's attorneys appeared and at his request stated that the witness was not present and would not appear.

On November 16, 1927, on the petition filed by the same attorneys, representing the government, the court issued an order directing Blackmer to appear on Friday, January 6, 1928, to show cause why he should not be adjudged guilty of contempt and punished accordingly; directing that his property within the United States, in the amount of $100,000 should be seized by the United States marshal "to satisfy any judgment that may be rendered against him in this proceeding." The marshal was also directed, upon making such levy, to forward to the consuls of the United States in France a copy of said order with the request that it be served personally upon the said Blackmer and the marshal was ordered to publish said order in The Washington Evening Star, a newspaper of general circulation in the District of Columbia, once a week for six weeks. The marshal's return showed that the $100,000, the property of Blackmer, was levied upon and seized. The United States consul at Paris made due return that a true copy of said order was served upon Blackmer personally. (R. 5131, pp. 12-13) The publication was made as ordered. (R. 5131, p. 14)

The case of United States vs. Sinclair and Fall proceeded to trial, but a mistrial was declared.

PROCEDURE IN NO. 5132.

The Sinclair-Fall case was reassigned for trial on April 2, 1928. (R. 5132, pp. 1-3)

On January 9, 1928, government counsel petitioned the court for an order to issue subpoenas for Blackmer and another citizen of the United States then in France. Said petition was signed by counsel and sworn to by Atlee Pomerene. They represented that the attendance of said witnesses was vital and important to the United States because it was believed that they had knowledge and information with regard to certain important facts, which the

United States desired to prove, and that their testimony as to said facts would be material in connection with the establishment of the conspiracy charge between the defendants in the Sinclair-Fall case, and in connection with the proof of overt acts done by them in the pursuance of said conspiracy.

Petitioner further believed and therefore averred that they could testify to facts concerning the persons who in the latter part of the years 1921 and 1922 were stockholders of the Continental Trading Company Limited, and with regard to the distribution by said company to its stockholders of certain 3½% Liberty Loan Bonds as dividends, which they believed and averred were subsequently delivered by the defendant, Harry F. Sinclair, to the other defendant, Albert B. Fall. (R. 5132, p. 2)

On the same day the court ordered the subpoenas to be issued, as prayed for, addressed to the consuls of the United States in France, commanding the said witnesses to appear in Criminal Court No. 2 on the 2nd day of April 1928, and directed that each of them be tendered Five Hundred Dollars ($500.00) for necessary expenses in traveling to and from Washington and for attendance at court. Said subpoenas were in the traditional form, addressed by the President of the United States to the witnesses, directing their appearance on April 2, 1928, at 10 o'clock, to testify on behalf of the United States and "not depart the court without leave of the court or District Attorney." (R. 5132, p. 4)

The subpoena for Blackmer was served by George Orr, Consul of the United States in France, and he made return that he had personally served the said Blackmer by exhibiting said subpoena personally to him, reading same to him and leaving a duplicate copy with him at Paris; also that he had, pursuant to the order of the court, tendered said Blackmer Five Hundred Dollars ($500.00) in currency, which tender Blackmer refused. (R. 5132, p. 5)

On July 6, 1928 Government Counsel filed their petition in the Supreme Court in the District of Columbia, representing that a subpoena was issued by the court for the said Harry M. Blackmer, a citizen of the United States, to appear in the Supreme Court of the District, as hereinbefore stated, on April 2, 1928; that a subpoena was issued and served accordingly on January 12, 1928, pursuant to said Act, which directed him to appear and "not depart the court without leave of the court or District Attorney"; that a tender of Five Hundred Dollars ($500.00) was made to the said Blackmer for necessary expenses; that due return was made by the said consul of said subpoena and of the tender of money (R. 5132, pp. 6-7); that the trial of said case was continued until Wednesday, April 4, 1928; that on April 3, 1928 the court continued the case until Monday, April 9, 1928; that counsel requested the court to have the Clerk call the said Blackmer as a witness; that the court so instructed the Clerk; that the Clerk called "Harry M. Blackmer" and the said Blackmer did not respond to said call and neglected and refused to appear.

Counsel asked for an order under Section 4 of said Act directing the witness to appear upon a day and time to be designated in said order "to show cause why he should not be adjudged guilty of contempt and punished accordingly." They further asked that the court issue an order directing the marshal to seize the property of the said Blackmer in the United States of the amount and value of $100,000 or such other value and amount as the court might think proper to satisfy any judgment that might be rendered against the said Blackmer in said proceeding. That the marshal made such levy and seizure, forwarded a copy of the order to United States Consul Orr to be served personally upon said Blackmer. He caused the said order to be published in a newspaper of general circulation in the District of Columbia. An order was issued thereon, on July 6, 1928. (R. 5132, pp. 9-10)

On December 26, 1928, an alias order was issued on said petition citing said Blackmer to appear before the Supreme Court of the District of Columbia on the 25th day of February, 1929, at 10 o'clock A. M. and show cause why he, the said Blackmer, should not be adjudged guilty of contempt of court in neglecting, failing and refusing to obey the subpoena heretofore issued by said court and served upon him to appear as a witness in the case of United States vs. Sinclair and Fall, the circumstances of which are very fully set out in the motion (or petition) of the plaintiff filed herein and why the said H. M. Blackmer should not be fined and punished therefor according to law. The marshal of the district was further ordered to seize the property of the said Blackmer to the amount and value of $100,000 or so much thereof as may be found and to hold the same until further ordered by the court for the purpose of satisfying any judgment that might be rendered against the said Blackmer in the said proceeding. The marshal, having made such levy and seizure, was ordered to forward to the consul of the United States at Paris, France, a copy of the said order with the request that the said consul should make personal service thereof upon the said Blackmer and make prompt return thereof to the Clerk of this Court and that the marshal should make personal service of said order, if said Blackmer should be found within the United States, and, having made the levy and seizure, to cause the order to be published in The Evening Star, a newspaper of general circulation. The publication was made. (R. 5132, pp. 11-12)

3½% Liberty Bonds were seized and held by the United States marshal, they being the same bonds seized and held by the said United States marshal, as set forth in the record in case No. 5131. Due return was made that the order was published in The Evening Star; (R. 5132, p. 12) that the bonds were seized by the United States marshal

(R. 5132, p. 14) and that George Orr, consul of the United States, personally served the said Blackmer with a copy of the said order on the 21st day of January, 1929, at Paris, France. (R. 5132, p. 14).

SUMMARY OF FACTS.

The record clearly shows in each case that a petition was filed with the court for the issuance of a subpoena for the said Blackmer; that an order was issued directing the issuance of the subpoena and the tender to him of Five Hundred Dollars ($500.00) in each case to cover his necessary expenses in traveling to and from Washington and his attendance in court; that the subpoenas were sent to the United States consuls in France; that they were served personally by said consuls upon the said Blackmer in Paris, France, and that tender in each case of Five Hundred Dollars ($500.00) was made to him, as hereinbefore set out. The witness failed to appear in the first case on October 17, 1927, the date named in the subpoena, and being called by the Clerk he failed and neglected to appear.

In the second case the subpoena required his appearance on April 2nd. He did not appear. The case was continued by order of the court until April 9th when the trial was begun. Blackmer failed to appear. His name was called.

A petition was filed in each case in the Supreme Court of the District of Columbia by Government Counsel for an order that Blackmer show cause why he should not be adjudged guilty of contempt of court in neglecting, failing and refusing to obey the said subpoenas. The marshal was ordered to seize and did seize the property described, and caused the order to be published in The Evening Star. The orders were forwarded to the United States Consuls and were personally served upon the said Blackmer. In a word

the procedure in each case was in our judgment in substantial, if not literal, accord with the provisions of the Act of July 3, 1926.

The two cases were tried together and a fine of $30,000 and costs adjudged in each case to be satisfied by the property seized.

In the court below the appellant filed a motion in each case to vacate and set aside the order to show cause. In case No. 16 below (R. 5131) Counsel for the appellant filed a brief from which we quote as follows:

> "* * * The proceedings here in question, however, were all taken in exact pursuance of an Act of Congress purporting to validate them and enacted for the very purpose of validating such proceedings in this particular case against this particular respondent. The question thus reduces itself to a consideration of the constitutionality of this legislation."
>
> (Appellant's Brief for the Respondent in Support of Motion to Vacate Proceedings, page 4.)

SUMMARY OF THE ACT AND PROCEEDINGS THEREUNDER.

Section 1 of the Act provides that the witness, if a citizen of the United States, or domiciled therein, refuses to respond to letters rogatory, addressed to any court of any foreign country, the court issuing such letters may authorize the issuance of a subpoena for such witness, to be served by any consul of the United States within the country where such witness may be, commanding him to appear before the court issuing such subpoena at a time and place designated. This section suffices for the purpose of any party to a civil action, and of a defendant in a criminal action, or in a contempt proceeding. The defendant in a criminal action has the right to letters rogatory. The United States does not have a corresponding right. If the

defendants in the Sinclair-Fall criminal conspiracy case desired the testimony of the appellant, they could have obtained letters rogatory and, if appellant had refused to respond, they could have subpoenaed him as a witness with like result to him, as in the pending case. The appellant also could have obtained letters rogatory in these contempt cases for any witness, a citizen of the United States or domiciled therein, and enforce the subpoena, as provided for in this Act.

Section 2 provides that in a criminal action the court, upon application of the Attorney General, or any Assistant or District Attorney, acting under him, may upon "a proper showing" order a subpoena to be issued and addressed to a United States consul for any witness desired, who is a citizen of the United States or domiciled therein and is beyond the jurisdiction of the United States. A petition was filed in each case and on the showing made the court ordered the subpoenas to be issued and served.

Under Section 3 it was made the duty of the consul to serve such subpoena personally and to make return thereof to the court issuing same, tendering to the witness the amount fixed by the court issuing the subpoena for his necessary expenses in traveling to and from the place of court and in attending thereon, said amount to be supplied to the consul making the service. This was done. (R. 5131, pp. 4, 43, 45) (R. 5132, pp. 4, 24, 26)

Section 4 of the Act provides that if the witness served shall neglect or refuse to appear, as in the subpoena directed, the court issuing the same, shall, upon proof being made of the service and default, issue an order directing the witness to appear before the court at a time in such order designated to show cause why he shall not be adjudged guilty of contempt and punished accordingly. This gives the recusant witness the notice and hearing necessary

to due process. The witness did not respond to the subpoenas and did not appear at either trial. (R. 5131, pp. 45-6) (R. 5132, pp. 26-27) Counsel for the United States presented a petition, or application in writing, to the court out of which the subpoenas had issued, showing *inter alia* the personal service made by the consuls, the tender of Five Hundred Dollars ($500.00) for expenses, the return of the consul, and that the witness did not respond to the subpoenas. (R. 5131, pp. 4-11) (R. 5132, pp. 5-9) The court, thereupon, in each case issued an order directing the appellant to appear before the court at a fixed time to show cause why he should not be adjudged guilty of contempt and punished. (R. 5131, pp. 11-12) (R. 5132, pp. 11-12)

Section 5 provides that the court, issuing such order, may direct the property of any such witness at any place within the United States, or so much thereof in value as the court may direct, to be levied upon and seized by the United States Marshal, to be held to satisfy any judgment that may be rendered against such witness. The court in each case directed the seizure of the witness's property to the value of $100,000. This was done. The same property was seized and held in the second case that was seized and held in the first case. Neither levy was abandoned.

Section 6 provides that the marshal, having made such levy, shall forward, to the United States consul of any country where the recusing witness may be, a copy of such order to show cause why such witness should not be adjudged guilty of contempt, with the request that the said counsel make service of the said order personally upon the recusing witness and cause the order to show cause and for the sequestration of the property of such witness, to be published in some newspaper of general circulation in the district within which the court, issuing the order, sits, once a week for six consecutive weeks. All of this was done. (R. 5131, pp. 12-14) (R. 5132, pp. 12-14)

In each case the order to show cause, as above described, was forwarded by the marshal to the United States consul at Paris and was personally served upon the witness and return of such service made, (R. 5131, pp. 12-13) (R. 5132, p. 14) and publication in each case was made in The Washington Evening Star, as directed. (R. 5131, pp. 14-16) (R. 5132, p. 12)

Section 7 of the Act provides that on the return day of the order to show cause, or any later day to which the hearing may be continued, proof shall be taken. If the charge of recusancy is sustained, the court shall adjudge him guilty of contempt and may impose upon him a fine not exceeding $100,000 and direct the amount thereof and the costs to be satisfied, unless paid, by the sale of the property of the witness so seized or levied upon.

The full text of the Act of July 3, 1926 is printed as an appendix hereto.

In each case a hearing was had on the 16th and 17th of September 1929. (R. 5131, p. 72) (R. 5132, p. 56)

The witness, Blackmer, was represented by counsel since shortly after May 17, 1927, the day when he was first served with a subpoena to appear in court and was given every opportunity to test the validity of the proceedings in the interval from the date of the first citation to the time of trial. We say that he was so represented by counsel since shortly after May 17, 1927, because Mr. George Gordon Battle testified (R. 5131, p. 77) (R. 5132, p. 70) that he was in Paris, France, in the summer of 1927 just after the first subpoenas had been served on Mr. Blackmer, saw him there at the time, discussed with him the constitutionality of the Walsh Act and of the procedure and advised him as to what his action should be with respect to responding to the subpoena. He told Blackmer that they (he and several other eminent attorneys) had considered very careful-

ly the constitutionality of the Walsh Act and that in their judgment it was unconstitutional and that the subpoena "was not a valid obligation upon him." The pleas of the appellant admit all the facts deemed by the Government Counsel to be necessary, except the official character of the consul serving the subpoenas and orders. This was proven in one case and admitted in the other. (R. 5131, pp. 73-74) (R. 5132, p. 59)

From a constitutional standpoint the procedure provided for in the Act of July 3, 1926, does not differ from the procedure with reference to suits to enforce liens against absent defendants, Section 57 of the Judicial Code. (U. S. C. A. Title 28, Section 118)

THE CONSTITUTIONALITY OF A STATUTE WILL BE PRESUMED.

A declaration that an Act of Congress is unconstitutional "should never be made except in a clear case." (Chief Justice Waite in the *Sinking Fund Cases*, 99 U. S. 700, 718)

To the same effect: Chief Justice Marshall in the case of *Fletcher v. Peck*, 6 Cranch, *87, *128; Mr. Justice Washington in the case of *Ogden v. Saunders*, 12 Wheat. *213, *270; and see, *Briscoe v. Bank of Kentucky*, 8 Pet. 118, 122; *Railway Company v. Wellman*, 143 U. S. 339, 345, 346; *Brown v. Walker*, 161 U. S. 591, 596; *Naganab v. Hitchcock*, 25 D. C. App., 200, 205; *Cooley's Principles of Constitutional Law*, 163, *et seq.*; 1 *Roses Notes* 396, 397, *et seq.*; and 2 *Roses Notes* 412, 418, *et seq.*

The principle of these cases can not be doubted. They are cited only for convenient reference.

ANSWERING PETITIONER'S POINT A.

I. THE ACT OF JULY 3, 1926 AND THE PROCEEDINGS HEREIN DO NOT VIOLATE DUE PROCESS UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION.

We do not claim the government has the right to invade by force the territory of another sovereignty against its will.

We do claim that the government has the right to recall its citizens who may be abroad for military service. By the same token it can recall them as witnesses. The means and method to be adopted are for the Congress to determine. The United States possesses the inherent sovereign power to recall its citizens from abroad. No one doubts the power of Congress by statute to authorize the President to recall its citizens who may be abroad to serve the country in time of war and to provide for penalties on failure to respond. Similarly in the administration of justice the Congress has a right to provide for the issuance of subpoenas and to have them served, as in this instance, by some designated individual. In the case at bar the Act of July 3, 1926 provides that the subpoena shall be directed to a consul of the United States in the country where the witness is residing. We submit the consul in making this service is not acting in a sovereign capacity. Rather he is acting in a ministerial capacity because of the order of the court under the statute.

Citizens owe allegiance to their sovereign in exchange for protection. They owe the same duty to obey the Constitution and the laws whether at home or abroad. Constructively the citizen witness is presumed to know the law. Actually he had personal knowledge of this law. (R. 5131, p. 77) (R. 5132, p. 70)

His duty to obey follows him wherever he is. The purpose of the Congress, in designating the consul to serve the subpoena and the orders, was no doubt to avoid un-

certainty and to save the expense of sending a special deputized officer from the United States to make service. In our judgment the service from a constitutional standpoint might just as well have been made by registered letter, or by telegram, if so authorized by statute. The essential thing was to give notice, not the method of giving it. He was personally served with the subpoena and the order. By what excuse can he avoid the consequence. If he had received the notice within the United States, he would have been compelled to comply at his peril. Is his duty to obey any the less because he received the notice abroad by direction of the court and under the authority of an Act of Congress?

II. DUTY OF PROTECTION OF THE CITIZEN BY THE GOVERNMENT AND OBEDIENCE BY THE CITIZEN TO HIS GOVERNMENT WHETHER AT HOME OR ABROAD.

The Constitution and the laws passed in pursuance thereof follow the citizen wherever he may be.

Carlisle v. United States, 16 Wall. 147 (1872). Mr. Justice Field, at page 154, said:

> "By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives. * * *"

Minor v. Happersett, 21 Wall. 162 (1874). Mr. Justice Waite said:

> "* * * He (a citizen) owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance."

Luria v. United States, 231 U. S. 9 (1913). Mr. Justice Van Devanter, at page 22, said:

> "Citizenship is membership in a political society and implies a duty of allegiance on the part of the

member and a duty of protection on the part of society. These are reciprocal obligations, one being compensation for the other."

Rose v. Himely, 4 Cranch 241 (1808). Mr. Chief Justice Marshall, at page 279, said:

"It is conceded, that the legislation of every country is territorial; that beyond its own territory, *it can only affect its own subjects or citizens.*"

The Appollon, 9 Wheat. 362 (1824). Mr. Justice Story, in his opinion at page 370, said:

"The laws of no nation can justly extend beyond its own territories, *except so far as its own citizens.* They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction."

Willoughby on the Constitution, at page 247, section 120:

"* * * Thus he (the citizen) does not in any way lose his citizenship by departing from the territorial limits of the State of which he is a member, *nor does he escape from beneath its law or cease to be entitled to its protection.*"

In Section 121, page 248, the same author says:

"In the preceding section it has been shown that a State has absolute legal authority over all persons within its territorial jurisdiction, and *over its own citizens wherever they may be.*"

To like effect see *Miller on the Constitution of the United States,* pages 294-295; *Vattel, "The Law of Nations,"* 1853 Edition, pages 105, 172, 173 and 174.

Moore: International Law Digest, Volume II, page 256:

In discussing punishment by the State for acts of its citizens done abroad, it is said:

"It is not to be doubted that each state may, in the exercise of its sovereignty, punish its own citizens

for such acts and in such manner as it may deem proper."

Charles Cheney Hyde: International Law, Volume I, page 424, paragraph 240:

> "It is generally agreed that a State may punish its own nationals for disobeying its commands while within a foreign country, notwithstanding the legal quality which the territorial sovereign may have annexed to the acts of disobedience. * * *"

III. UNDER THE ENGLISH COMMON LAW AND THE ACTS OF PARLIAMENT CITIZENS ABROAD AND NOT RETURNING HOME WHEN SUMMONED ARE GUILTY OF CONTEMPT.

In 1559 The Exchequer decided the case of *Bartue and Duchess of Suffolk* (2 Dyer's Reports 176b). Queen Mary had given Bartue permission to go to Germany to collect debts due the estate of the Duke of Suffolk. The Duchess of Suffolk followed without license. In truth both left for religious reasons. The Queen sent a messenger with summons under seal commanding their return, but their servants attacked the messenger and forced his return without service of the summons. The messenger reported to chancery and chancery issued *mittimus* to exchequer. Exchequer issued a commission to a gentleman in Lincoln County reciting the contempt and directed seizure of all real, personal and mixed property of the fugitives and return of rents into the exchequer. This was done until 1558 when the fugitives filed a traverse in the exchequer to the charge of contempt alleging they did not adhere to enemies of England and that the purpose for granting the license had not been completed. The Judges held the fugitives guilty of contempt.

In 1579 the Exchequer division of Court of Common Pleas decided *Knowles v. Luce* (Moore 109; 72 English Reports, Full Reprint, 473). Knowles brought ejectment against Luce involving a copyhold. The question was the

validity of the seizure under order of the Queen. The property had belonged to Englefield who was given a license to go abroad. Subsequently the Queen sent a messenger with summons for his return, which was served and not obeyed. The Queen issued a warrant reciting the contempt and directing the commissioners to seize his property. The income thereafter was paid to the Queen. The procedure was repeated in 1570 under a statute that year passed. The finding was for Knowles and it was said in the opinion:

> "The reason for the judgment as it was delivered by Manwood, Chief Barron, was such (that is) that the thirteenth and fourteenth statutes of Elizabeth were made in accordance with the common law, and did not give the Queen any new right, but only explained what she had before; *for by ancient prerogative, the Queen had a natural interest in the person of each subject, to serve her in such capacity as she should appoint;* and for this the common law gives the principle of *'non exeas Regnum'* (Do not leave the Country) before the subject goes outside of the Realm, *and when he is overseas, the common law gives the Queen liberty to recall him, and if he does not wish to return then the Queen can seize his lands until he returns, and use the profits in the maintenance of others to do the service that he would do her if he were in the Realm; and also to restrain him from the ability and power of continuing in his disobedience;* and with respect to this he cites two precedents in the Exchequer, viz. the case of Mortymer in the reign of Edward II and the case of Bartue in the reign of Queen Mary."

IV. UNDER THE REVENUE ACTS NON-RESIDENT CITIZENS ARE LIABLE FOR TAXES ON INCOME EARNED IN BUSINESS IN FOREIGN COUNTRIES.

In *Cook v. Tait,* 265 U. S. 47 (1924) under the Revenue Act of 1921, Section 210 (42 Stat. 227, 233) the United States taxes non-resident citizens upon their income from earnings not within the territorial domain of the United

States. The Supreme Court held this statute a constitutional exercise of sovereign jurisdiction. Cook sued Tait, a Collector of Internal Revenue. Cook was a native citizen of the United States domiciled in Mexico. Under protest he made a return of his income from property situated in Mexico. He began suit to recover. A demurrer to the petition was sustained. The Supreme Court affirmed it. Mr. Justice McKenna, delivering the opinion, on page 54, said:

> "Plaintiff assigns against the power not only his rights under the Constitution of the United States but under international law, and in support of the assignments cites many cases. It will be observed that the foundation of the assignments is the fact that the citizen receiving the income, and the property of which it is the product, are outside of the territorial limits of the United States. These two facts, the contention is, exclude the existence of the power to tax. Or to put the contention another way, as to the existence of the power and its exercise, the person receiving the income, and the property from which he receives it must both be within the territorial limits of the United States to be within the taxing power of the United States. The contention is not justified, and that it is not justified is the necessary deduction of recent cases."

The court rejected the contention that a citizen's property without the limits of the United States derives no benefit from the United States. It decided the government's power is based on the presumption that government by its very nature benefits the citizen and his property wherever found.

Mr. Justice McKenna further adds: (p. 56)

> "* * * Or to express it another way, the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, *and was not and cannot*

*be made dependent upon the domicile of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen. * * *"*

V. CITIZENS PUNISHABLE IN THE UNITED STATES FOR OFFENSES COMMITTED ON THE HIGH SEAS OR IN FOREIGN COUNTRIES.

United States v. Bowman, 260 U. S. 94 (1922). The indictment was for a criminal conspiracy to defraud the United States Shipping Board. The defendant in error and others conspired on the high seas for the delivery at Rio de Janeiro by the Standard Oil Company of 600 tons of oil and to charge the Emergency Fleet Corporation for 1,000 tons and then divide the money for the undelivered 400 tons among themselves. 600 tons of oil were delivered at Rio de Janeiro. Payment was collected for 1,000 tons. A demurrer was filed to the indictment upon the ground of lack of jurisdiction because the crime was committed on the high seas or within the jurisdiction of Brazil. The demurrer was sustained and the indictment quashed. In reversing the judgment of the District Court Mr. Chief Justice Taft, in discussing the extraterritorial jurisdiction of the United States, said: (pp. 98-100.)

"But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on

the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense. Many of these occur in c. 4, which bears the title 'Offenses against the operations of the Government.' Section 70 of that chapter punishes whoever as consul knowingly certifies a false invoice. Clearly the locus of this crime as intended by Congress is in a foreign country and certainly the foreign country in which he discharges his official duty could not object to the trial in a United States court of a United States consul for crime of this sort committed within its borders. Forging or altering ship's papers is made a crime by Sec. 72 of c. 4. It would be going too far to say that because Congress does not fix any locus it intended to exclude the high seas in respect of this crime. The natural inference from the character of the offense is that the sea would be a probable place for its commission. Section 42 of c. 4 punishes enticing desertions from the naval service. Is it possible that Congress did not intend by this to include such enticing done aboard ship on the high seas or in a foreign port, where it would be most likely to be done? Section 39 punishes bribing a United States officer of the civil, military or naval service to violate his duty or to aid in committing a fraud on the United States. It is hardly reasonable to construe this not to include such offenses when the bribe is offered to a consul, ambassador, an army or a naval officer in a foreign country or on the high seas, whose duties are being performed there and when his connivance at such fraud must occur there. So, too, Sec. 38 of c. 4 punishes the wilfully doing or aiding to do any act relating to the bringing in, custody, sale or other disposition of property captured as prize, with intent to defraud, delay or injure the United States or any captor or claimant of such property. This would naturally often occur at sea, and Congress could not have meant to confine it to the land of the United States. Again, in Sec. 36

of c. 4, it is made a crime to steal, embezzle, or knowingly apply to his own use ordnance, arms, ammunition, clothing, subsistence, stores, money or other property of the United States furnished or to be used for military or naval service. It would hardly be reasonable to hold that if any one, certainly if a citizen of the United States, were to steal or embezzle such property which may properly and lawfully be in the custody of army or naval officers either in foreign countries, in foreign ports or on the high seas, it would not be in such places an offense which Congress intended to punish by this section." * * *

and further, at page 102:

"* * * We cannot suppose that when Congress enacted the statute or amended it, it did not have in mind that a wide field for such frauds upon the Government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intended to include them in the section."

* * * * * *

"* * * The three defendants who were found in New York were citizens of the United States and were certainly subject to such laws at it might pass to protect itself and its property. *Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance.* * * *"

If then the Congress of the United States can make an act committed by an American citizen in a foreign country, or on the high seas, criminal and punishable within the United States, as the learned Chief Justice Taft pointed out in *United States v. Bowman, supra,* it is hard to conceive any sound reason why a witness, a citizen of the United States, residing abroad, served with a subpoena issued by the court under the authority of the Congress, can refuse to obey its command without being in contempt.

If, as the learned Chief Justice further pointed out, the Congress should limit the locus of offenses to the strictly territorial jurisdiction of the United States, it would greatly curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home.

Adopting the same thought, if we limit the jurisdiction of our courts in contempt proceedings, to those who are served with process within the United States, and make no provision to compel attendance of witnesses who are citizens, and who are beyond the bounds of the United States, we would make immune contempts of court which are as easily committed beyond as within the territory of the United States.

The United States did not seek to serve the subpoena, or the order of the court, upon Blackmer against the will of France. The record does not disclose that France raised any objection to the service of the subpoena, or the order of court, citing Blackmer for contempt. If France made, or was inclined to make any such protest, it would have been evidenced through the proper diplomatic channels. Blackmer is a citizen of the United States and subject to its sovereign will, whether at home or abroad. France has not delegated, so far as the record shows, to Blackmer the authority to make this protest. Blackmer is acting in his own behalf, not in behalf of France. His concern upon its face is more for the sovereignty of France, to which he owes no allegiance, than for the sovereignty of his country from which he receives protection and owes allegiance and obedience whether at home or abroad.

Obviously the United States could not invade France and kidnap Blackmer without her consent. That would offend the dignity and peace of France, but the Congress can create an obligation upon Blackmer to return as a wit-

ness which might be subject to penalties for a breach which could not disturb France:

1. by arrest upon his return;
2. by expatriation, or
3. by forfeiture of property within the control of the United States.

Any other limitation upon the extraterritorial power of a sovereign over its citizens abroad is unsound in principle and contrary to authority.

Thus, a sovereign may require its citizens to return for military duty and to pay taxes on his property at home or abroad. If so, why cannot the sovereign require such witness to give testimony for the sovereign, or to do any other act of allegiance, or of civic or military duty, and enforce such requirements in any way not inconsistent with the peace, dignity and equality of the alien sovereign, provided that in this country, under our Constitution the witness is given a reasonable opportunity to be heard and to show why apparent disobedience is not actual disobedience.

VI. APPELLANT FAILS TO SEE THAT THIS PROCEEDING IS ONE QUASI IN REM OR IN REM AND NOT IN PERSONAM.

The judgment rendered in these cases is only enforceable against the property seized. No effort has been made, or could be made, to enforce it personally, or against property other than that which was seized. If it could not be thus satisfied in whole or in part, we are not claiming that property could be seized elsewhere, as in a judgment *in personam*.

The authorities cited by the petitioner are inapt.

They are either:

1. Cases which recognize that sovereigns have extra-territorial power as

Schooner Exchange v. M'Faddon, 7 Cranch, 116 (Plaintiff's Brief, p. 24); or

2. Cases which hold that a state court, in absence of a statute so authorizing, may not render a *personal* judgment against a defendant not found within the state and not a resident thereof as

Pennoyer v. Neff, 95 U. S. 714,

but it does recognize that *the jurisdiction of the court extends only over property within the state.*

To the same effect:

Picquet v. Swan, 5 Mason 35;

Galpin v. Page, 18 Wall. 350; or

3. Cases holding that a state cannot compel non-resident aliens to personally respond to a subpoena *in the absence of a statute* as in

Minder v. Georgia, 183 U. S. 559; or

4. Cases holding that a state court may not, *in the absence of a statute,* render a personal judgment against *an absent citizen who was not personally served* with process within the state, or did not voluntarily enter an appearance; said cases, however, holding the validity of judgment in cases *quasi in rem* to the extent of the "*res,*" as in

Cooper v. Reynolds, 10 Wall. 308; or

5. Cases turning upon the *absence of or insufficiency of* necessary federal legislation as in

Toland v. Sprague, 12 Peters 300,

in which the court said: (page 329)

"The process of a circuit court cannot be served without the district in which it is established, *without the special authority of law therefor.*"

and

Robertson v. Railroad Labor Board, 268 U. S. 619,

which holds that under the Transportation Act a district court in one district cannot issue and serve its

process in another judicial district *without authority of statute;* or

6. Cases which concern the enforcement of foreign judgments in this country and have no bearing on the allegiance and duties which an absent citizen owes the United States as

Bischoff v. Wethered, 9 Wall. 812,

in which appears this language concerning a judgment rendered *in England by virtue of a statute:*

"Whatever validity it may have in England, by virtue of statute law, against property of the defendant there situate, it can have no validity here"; or

7. Cases holding one nation may not invade another without its consent or establish an admiralty court there without a treaty as

Glass v. The Sloop Betsey, 3 Dallas 6.

Counsel for the petitioner refer to a number of cases in which it is held that a personal judgment cannot be rendered against an absent defendant. So far as we know in all said cases a judgment *in rem* can be rendered so as to subject property seized, as under attachment in the States, to the payment of said claim or judgment.

Counsel for petitioner cite no case holding that the Congress can not authorize the courts to cause service of process to be made beyond the territorial confines of the United States.

We are not contending that a judgment *in personam* may be rendered in the cases at bar without enabling legislation.

VII. A JUDGMENT IN PERSONAM MAY BE RENDERED IN STATE COURTS AGAINST A CITIZEN ABSENT FROM THE STATE, WHERE SERVICE IS PERSONALLY MADE WITHOUT THE STATE UNDER A STATUTE SO AUTHORIZING.

In state courts a personal judgment may be rendered against a citizen absent from the state where personal service is made without the state.

In Massachusetts it has always been held that a personal judgment can be rendered against an absent citizen of the state provided that actual service of the pendency of the case was given him.

In *Nichols v. Vaughan,* 217 Mass. 548, Rugg, *C.J.,* quotes approvingly from Chief Justice Bigelow in *Langdon v. Doud,* 6 Allen, 423, at page 425 the following:

> "So long as a debtor has a last and usual place of abode in the commonwealth, that is, while he retains his domicile or residence here, the courts of the state have jurisdiction over him, and due service of legal process can be made upon him. * * * A writ can be served by leaving a summons at his last and usual place of abode, and in the case of his absence from the state actual notice * * * can be given to him, so that a valid and binding judgment can be obtained."

To the same effect *In Re Hendrickson,* 167 N. W. Rep. 172 (1918) the Supreme Court of South Dakota notes approvingly 35 L. R. A. pp. 296-297 and adds:

> "We therefore conclude that under our laws, which do not violate the principles of due process of law in so far as absent citizens of this state are concerned, the County Court of Hamlin County acquired jurisdiction over the person of the alleged incompetent by the service of a citation upon her in the State of Minnesota."

Under the Act of July 3, 1926, special authority to serve the subpoena and the order of the court was specially given by the Act of Congress.

VIII. CONTEMPT—PROCEEDINGS ARE SUI GENERIS.

The appellant fails utterly to distinguish between crimes and criminal contempts. The proceedings herein are not *in personam*, but *quasi in rem* or *in rem*.

The contempt proceedings are *sui generis*. Indictments, or informations, in the ordinary acceptation of these terms are not required. There is no fixed formula for contempt proceedings.

Schwartz v. United States, 217 Fed. 866 (C. C. A. 4th Circ., 1914). On page 868 Circuit Judge Woods said:

> "* * * There is no fixed formula for contempt proceedings, and technical accuracy is not required. *It is sufficient if the offense is set out, so that the defendant is clearly informed of the charges against him and whether a criminal or civil contempt is alleged;* and this is to be determined by examination of the entire record."

Gompers v. Bucks Stove & Range Co., 221 U. S. 418.

In *Myers et al. v. United States*, 264 U. S. 95 (1924) Mr. Justice McReynolds, in delivering the opinion, said that contempt proceedings are "*sui generis.*"

> "* * * neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms—and exertions of the power inherent in all courts to enforce obedience, something they must possess in order properly to perform their functions. *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 326."

> "* * * While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as *sui generis* and not 'criminal prosecutions' within the Sixth Amendment or common understanding."

In upholding the constitutionality of certain provisions of the Clayton Act, requiring a jury trial in certain speci-

fied kinds of contempt, Mr. Justice Sutherland in *Michaelson v. United States,* 266 U. S. 42 (1924) said:

> "But it is contended that the statute materially interferes with the inherent power of the courts and is therefore invalid. That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior federal courts are concerned, however, it is not beyond the authority of Congress (*Ex Parte Robinson,* 19 Wall. 505, 510-511; *Bessette v. W. B. Conkey Co.,* 194 U. S. 324, 326); but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. *That it may be regulated within limits not precisely defined may not be doubted. The statute now under review is of the latter character.*"

Further on Mr. Justice Sutherland said:

> "This is also pointed out by counsel in the case of *O'Shea v. O'Shea and Parnell,* L. R. 15 Prob. Div. 59, 61; and, in the course of one of the opinions in that case, it is said:
>
> "'The offense of the appellant (criminal contempt) is certainly a criminal offense. I do not say that it is an indictable offense, but, whether indictable or not, it is a criminal offense, and it is an offense, and the only offense that I know of, which is punishable at common law by summary process.'"

In Re Gompers, 40 App. Cases (D. C.) 293 (1913) Mr. Justice Van Orsdel, in discussing contempt of court, said (pp. 322-323):

> "In the decisions, the courts have expressed a variety of views as to the nature of the action for the punishment of contempts. Some have held it to be a criminal proceeding, in that a penalty is attached;

some have held it to be in the nature of a criminal proceeding. Penalty and punishment are not alone sufficient to distinguish the proceeding as criminal. The action is *sui generis*, in a class by itself, partaking of some of the elements of both civil and criminal proceedings, but, strictly speaking, it is neither. It belongs to a class of proceedings inherent in the court, and deemed essential to its existence. * * * Contempt, therefore, is without any particular form of action, and not subject to the limitations of procedure prescribed for the conduct of either civil or criminal actions. * * *"

The proceedings herein do not differ in principle from proceedings *in rem* recognized in attachment proceedings under the State laws, or from the proceedings *in rem* authorized by Section 57 of the Judicial Code with respect to absent defendants in suits to enforce legal or equitable claims, or to quiet title.

In *Central Loan & Trust Company v. Campbell Commission Company*, 173 U. S. 84 (1899) Mr. Justice White said:

"* * * In a proceeding by attachment of property, which is in the nature of an action *in rem, it is elementary that the defendant is found, to the extent of the property levied upon, where the property is attached.* It would be an extremely strained construction of the language of the act to hold that Congress intended to prohibit a remedy universally pursued, that of proceeding against the property of non-residents in the place in the territory where the property of such non-resident is found."

In *Missouri v. North*, 271 U. S. 40 (1926) Mr. Justice Stone, at page 42, said:

"The due process clause does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be

heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it."

IX. PROCESS OF A COURT MAY EXTEND BY LEGISLATIVE AUTHORITY FROM ONE DISTRICT TO ANOTHER.

The petitioner cites *Big Vein Coal Company v. Read*, 229 U. S. 31, in which a question arose as to whether a remedy by attachment could be had in the Circuit Court of the United States where personal service could not be made on the defendant. Mr. Justice Day, delivering the opinion, held that, under the federal statute, the defendant must be subject to personal service or voluntarily appear before the right of attachment could obtain. He adds at page 38:

"* * * If Congress had intended any such radical change, it would have been easy to have made provision for that purpose, and doubtless a method of service by publication in such cases would have been provided. * * *"

Such method has been provided by Congress under the Act of July 3, 1926 involved herein.

In *Mellen v. Moline Iron Works*, 131 U. S. 352, in an action to quiet title in the federal court of Illinois, one of the defendants was a citizen of Ohio and was personally served under Section 57 of the Judicial Code, but he failed to appear and defend and was denied the right within one year to move to reopen the case.

In U. S. C. A: Title 28, Judicial Code & Judiciary, Chapter 2, Paragraph 26, in insurance cases in an action for interpleader federal courts are authorized to issue process extending to claimants in any other district of the United States.

X. LIKEWISE PROCESS OF COURT MAY BE EXTENDED BY CONGRESS TO FOREIGN COUNTRIES.

Thus, it is clear, that when sufficiently authorized by statute a court's process may run to a foreign country in such a way as to give the court jurisdiction over matters subject to its territorial jurisdiction.

Section 57 of the Judicial Code (U. S. C. A. Title 28, Sec. 118) provides that in any suit begun in any District Court of the United States to enforce any legal or equitable lien, or to quiet title to real or personal property within the district where such suit is brought, if one or more of the defendants therein is not an inhabitant of, or found within the district, upon order of the court, he may be required to appear and plead. If not found in the district he may be served *"if practicable, wherever found."* This statute was under consideration by this Court in *Perez v. Fernandez,* 220 U. S. 224. In that case the property in suit was located in Porto Rico. The defendant, Perez, was a citizen and resident of Spain. The marshal made the return that he could not be found for personal service. Publication was had. Under the statute within a year Perez applied to set aside the judgment. The plain and necessary implication of the decision is that under Section 57 of the Judicial Code a court of the United States has power to base its jurisdiction upon personal service outside of its district and in a foreign country. (See pp. 230-231)

XI. NO SPECIAL FORM OF PROCEDURE OR NOTICE REQUIRED.

In *Cooke v. United States,* 267 U. S. 517 (1925) Mr. Chief Justice Taft, in discussing contempt in open court, said (pp. 536-537):

> "* * * there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and

argument. The exact form of the procedure in the prosecution of such contempts is not important. * * *"

"The court in *Randall v. Brigham*, 7 Wall., 523, 540, in speaking of what was necessary in proceedings against an attorney at law for malpractice said:

> 'All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, *notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation.*'

"The court in *Savin, Petitioner*, 131 U. S. 267, applied this rule to proceedings for contempt.

> "*Due process of law, therefore, in the prosecution of contempt*, except of that committed in open court, *requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation.* * * *"

Applying these principles we have in the cases pending subpoenas served personally by order of the court, expense money tendered, neglect to appear, an order of the court to show cause why he should not be punished for contempt, notice thereof personally served, a hearing, and his own counsel testifying that he advised Blackmer that the Act was unconstitutional, the proceedings thereunder illegal and in mitigation testifies that for the reasons stated Blackmer did not appear. All of this gives notice of the offense charged and a reasonable opportunity to be heard. Due process of the Fifth Amendment of the Constitution is therefore not violated.

ANSWERING PETITIONER'S POINT B.

THE PROCEEDING IS QUASI IN REM, OR IN REM, NOT IN PERSONAM.

Answering petitioner's Point B, to the effect that the Act does not provide due process, we adopt, without repeating here, our previous argument on Point A. With due respect the petitioner seems to misunderstand. It must be construed as a whole, not piecemeal. The witness was served personally. He refused to appear. On petition of the government the court issued the order to show cause and to seize the property. Again, the witness was served personally with a copy of the order. A cause of action in contempt is thus stated. It is similar to a civil action with the writ of attachment ancillary thereto. The plaintiff in a civil suit is obliged to make proof of his claim on trial before the attached property can be subjected to its payment. So here the government makes out its charge of contempt and the court, if the recusant witness is found guilty, assesses the fine before the property seized can be subjected to its payment. Of course, this proceeding is based upon the Act of July 3, 1926. We concede that without this legislation it could not be maintained.

ANSWERING PETITIONER'S POINT C.

THE PETITIONER HAD ACTUAL NOTICE OF THE OFFENSE CHARGED AND THE GOVERNMENT'S CLAIM AGAINST HIS PROPERTY.

A subpoena and the order to show cause were personally served. The witness refused to respond to either. He violated both the subpoena and the order of the court. If any desired information was not disclosed by the subpoena and the order, it was of record in court and available, if he had responded.

The petitioner to sustain his contention refers to the provisions of the Clayton Act (U. S. C. A. Title 28, Sec-

tion 387) relating to certain specific acts. The Clayton law requires that a copy of the affidavit of information shall be served upon the person charged. Such being the requirement of the Clayton Act, it must be complied with.

The Act of July 3, 1926, contains no such provision. The Congress evidently thought that such provision was not advisable or necessary under the Act of July 3, 1926. It does not follow that because the Congress saw fit to use one form of procedure under the Clayton Act that the same form of procedure must be followed in the Walsh Act. No special form of procedure is required in contempt cases under the common law. It can be modified, at least so far as the lower courts are concerned, by the Congress.

Michaelson v. United States, 266 U. S. 42, *supra.*

Having received the notices of the subpoenas and the orders, as above set out, being advised by his own counsel as to the alleged unconstitutionality of the Act and the proceedings thereunder, and there being no provision under the Constitution as to the form of the notice to be served, it does not lie in petitioner's mouth to say that he had no "actual or any other notice" of the offense, or of the government's claim against his property.

ANSWERING PETITIONER'S POINT D.

THE SEARCH AND SEIZURE PROVIDED BY THE ACT IS NOT AN UNREASONABLE SEARCH AND SEIZURE AND DOES NOT VIOLATE THE FOURTH AMENDMENT.

The Act provides in this behalf, Section 5, that the property of the recusant witness, or so much thereof as the court may direct, may be levied upon and seized by the marshal in the manner provided by law, or the rule of the court, for a levy or seizure under execution, to be held to satisfy any judgment. There is not one word in the record showing any "unreasonable search" or any search in fact. It does provide for a levy and seizure, nothing more.

The court limited the amount in each case to be seized at the amount and value of $100,000. There is enough in the record to show that Blackmer was a man of large affairs; that he was living abroad and had been for years; that he refused to testify in the Mammoth Oil Company case; that he was told of the provisions of the Act; that he saw fit to ignore the notices of the court in a case of great importance to the government.

In refusing to find that a penalty of $1,600,000 imposed upon a corporation, guilty of violating the Anti-Trust Law in Texas, was too excessive, the Supreme Court in the case of *Waters-Pierce Oil Company v. Texas,* 212 U. S. 86 (1909); Mr. Justice Day, delivering the opinion, said:

> "The fixing of punishment for crime or penalties for unlawful acts against its laws is within the police power of the State. We can only interfere with such legislation and judicial action of the States enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law."

ANSWERING PETITIONER'S POINT E.

THE PROVISIONS OF THE ACT FOR HEARING AND JUDGMENT IN HIS ABSENCE AND WITHOUT HIS CONSENT DO NOT VIOLATE DUE PROCESS.

Again, we must remind the petitioner that this is a proceeding for punishment for criminal contempt and not for a crime. The procedure adopted was a substantial, if not a literal compliance with the statute.

The power to punish for contempt is inherent in all courts. It "may be regulated within limits not precisely defined" by the Congress.

Michaelson v. United States, 266 U. S. 42, *supra.*

While the witness specially appeared, for the purposes of his motion to vacate the order and the proceedings there-

under, because of their unconstitutionality, and again in filing his pleas and amended pleas, and in objecting to the taking of any testimony in the absence of the defendant (R. 5131, p. 73 and R. 5132, p. 57), Mr. George Gordon Battle took the stand in behalf of the defendant to testify in mitigation of the offense charged. (R. 5131, pp. 76-84 and R. 5132, pp. 70-78)

Mr. Justice Robb in delivering the opinion of the Court of Appeals referred to the fact that Mr. George Gordon Battle took the stand in behalf of the defendant to testify in mitigation of the offense and said:

> "This amounted to a general appearance and appellant will not now be permitted to challenge the sufficiency of the rules to show cause."

Blackmer v. United States, 49 Fed. (2d) 523;

Similar authorities:

Bradstreet Company v. Bradstreet's Collection Bureau, 249 Fed. 958 (2 C. C. A. 1918);
Hammond et al. v. District Court, 228 Pac. 758;
Massachusetts Bonding & Insurance Company v. Concrete Steel Bridge Company, 37 Fed. (2d) 695 (4 C. C. A. 1930);
1 *Foster's Federal Practice,* 976.

ANSWERING PETITIONER'S POINT F.

THE PETITIONER COMPLAINS THAT THE ACT VIOLATES THE SIXTH AMENDMENT BECAUSE IT DOES NOT GIVE TO THE DEFENDANT IN A CRIMINAL PROSECUTION THE RIGHT TO EXTRA-TERRITORIAL SUBPOENAS, OR TO HAVE COMPULSORY PROCESS IN HIS BEHALF.

The Sixth Amendment provides for compulsory process, but it does not provide for equal process. Under Section 1 of the Act, if a citizen refuses to respond to letters rogatory, the court, issuing such letters, may authorize the

issuance of a subpoena for such citizen to appear, before the trial court at the time and place designated. The authority under this section is available to either party in a civil case and to the defendant in a criminal action, or in a contempt proceeding. The government cannot take advantage of it, because the Constitution requires that the defendant shall be confronted by the witness against him at the trial. The United States is not entitled to letters rogatory in a criminal case. The defendant may have such letters, and, if the witness refuses to respond, he may be subpoenaed, as provided in the subsequent sections. He, therefore, has substantially equal process to that accorded the United States.

In *United States v. Heinze*, 218 U. S. 532 (1910) the contention was advanced that the defendant in a criminal case was denied due process and equal protection of the law, because he was not accorded rights to appeal equal to those accorded the prosecution. The contention was rejected.

ANSWERING PETITIONER'S POINT C.

THE ACT IS NOT ARBITRARY, CAPRICIOUS AND UNREASONABLE.

When the subpoena was served and the witness failed to respond the contempt was complete. Ownership of property is not an element of the offense. If he is beyond the territorial jurisdiction of the country, then a method is provided for his punishment in part by seizing his property within the territorial jurisdiction of the United States. If he has no property, then the court may be powerless to enforce its order. Because the court may, or may not be able to proceed where the recusant witness has no property, is not a sound reason why another should escape, who has property within the territorial jurisdiction of the court.

As well might it be said that a debtor in a civil action should escape liability, if he was beyond the jurisdiction of the court and had property within its jurisdiction, because another debtor had gone beyond the jurisdiction of the court who had no property within its jurisdiction.

ANSWERING PETITIONER'S POINT H-a.

PROCEDURAL POINTS.

PETITIONER COMPLAINS OF LACK OF PROPER SHOWING FOR SUBPOENAS.

Section 2 provides that upon a "proper showing" the judge before whom the action is pending may issue an order for a subpoena, addressed to any consul where the witness may be, commanding his attendance. It is not for the witness to determine what is a "proper showing." The power is addressed to the court to issue, or not to issue, the subpoena and lies in his discretion. It is assumed he will use a judicial discretion. Nothing in the record shows abuse of judicial discretion, either in the issuing of the subpoena or the order to show cause.

In each case a petition duly signed by the United States Attorney and by two special assistants to the Attorney General, and verified by one of them, was presented to the court; and the order was issued thereon. (R. 5131, p. 3) (R. 5132, p. 3)

ANSWERING PETITIONER'S POINT H-b.

PETITIONER COMPLAINS THAT THE SUBPOENA DID NOT CARRY NOTICE OF THE ACT.

It did not. Constructively the witness knew the law. Actually he was advised by his counsel of the law and its provisions and under the alleged belief on witness' part that it was unconstitutional, he refused to obey.

Petitioner asserts it is not contempt to disobey a witness subpoena served extra-territorially and cites *Robert-*

son v. Railroad Labor Board, 268 U. S. 619. The question there was whether under the Transportation Act the Railroad Labor Board could subpoena a witness from one judicial district to appear in another. The Supreme Court held that under that particular statute no such authority existed. The case is clearly to the effect that the authority to issue and serve such subpoena depends upon the scope of the legislation. We note that subpoenas may be issued under the criminal practice for witnesses in any state of the Union.

Under a statute, which recently expired by limitation, in civil cases the court could order the issuance of a subpoena for a witness extending into any state.

Petitioner complains that the subpoenas are defective because they do not show that they were issued under the authority of the Act. No such provision is contained in this Act, nor in any other Act, so far as we know. One case was cited in the court below sustaining petitioner's contention. It was a Canadian case in which the statute itself expressly provided that such notice should be incorporated in the subpoena.

Directly contrary to the contention of the petitioner the common law does make it contempt to disobey a subpoena issued by the sovereign and served extra-territorially. See:

Bartue and Duchess of Suffolk, and
Knowles v. Luce, supra.

ANSWERING PETITIONER'S POINT H-c.

PETITIONER COMPLAINS THERE WAS NO NOTICE OF THE ALLEGED OFFENSES, OR OF THE CLAIMS AGAINST HIS PROPERTY.

He does not contend as to the form of the notice. He protests the total lack of notice in any form. (Petitioner's Brief, page 44)

If we understand correctly this seems to beg the entire question. We assume he means no constitutional notice was

given. The facts, as heretofore stated, are that the court ordered the subpoena to be issued. It was served personally by the consul and due return thereof made. The order to show cause was likewise issued and personally served. Under the notices thus authorized and personally served the witness was advised by the subpoena:

1. in what case to appear;
2. that it was by order of the President of the United States;
3. when and where to attend court;
4. to testify on behalf of the United States and not to depart without leave.

By the order to "show cause" he was advised:

1. the court in which he was to have a hearing;
2. the time of such hearing;
3. its object;
4. the seizure of the property;
5. the object of the seizure.

This certainly is such notice as to provide due process of law.

ANSWERING PETITIONER'S POINT H-d.

LEVY AND SEIZURE IN NO. 5131 NOT ABANDONED.

In No. 5131 certain bonds were seized. In No. 5132 the same bonds, which had been theretofore seized in No. 5131, were again seized. The seizure in both cases was on behalf of the United States against the same witness. Petitioner claims abandonment in the first case. There is no evidence in the record that the first seizure was abandoned.

As pointed out by Mr. Justice Robb in the court below the authorities cited by the petitioner are:

"to the effect that if in a particular action an alias order is issued before the property taken under the original

writ is disposed of, the alias order destroys the lien acquired by the original writ. These cases are not in point, for here there were two different seizures in two different cases upon two different causes of action."

ANSWERING PETITIONER'S POINT H-e.

PETITIONER CLAIMS HE WAS SUBPOENAED TO ATTEND TRIAL ON APRIL 2, 1928, AND NOT ON APRIL 9, 1928.

Blackmer was subpoenaed to appear on April 2, 1928, as a witness in United States v. Sinclair-Fall. Later the case was continued to April 4, 1928. On April 3, 1928 the court continued the case until April 9, 1928. The witness did not appear on any of the days named. His subpoena directed that he attend to testify on behalf of the United States and "not depart the court without leave of the court or District Attorney." (R. 5132, pp. 8, 78, 79)

U. S. C. A., Title 28, Section 655;
U. S. C. A., Title 28, Section 877.

Had he attended on April 2, 1928, he would have been advised of the continuances of the case.

IN CONCLUSION.

While the government admits that the Act of July 3, 1926 has never been before this Court for construction, the principles involved have been. Citizens, whether at home or abroad, owe allegiance to the country and obedience to the Constitution and the laws in peace, as well as in war.

The petitioner was a citizen of the United States, temporarily residing abroad, and was desired as a witness in the trial of an important case. On the sworn petition of counsel for the government the court issued a subpoena to the American consul in France, directing him to personally serve the witness and to tender him Five Hundred Dollars ($500.00) for traveling expenses and the attendance upon the court. The subpoenas were served personally,

the money tendered and due return thereof made to the court. The witness refused to appear and did not respond when called by the Clerk.

Upon petition in each case by government counsel, showing the procedure as stated, the court issued an order for the witness to appear to show cause why he was not in contempt; his bonds to the amount of $100,000 were ordered seized. They were seized by the marshal to be held to await disposition of the case, and publication of said order made in a paper of general circulation in the District of Columbia. The order, as issued, was served personally upon the witness and published. The witness did not appear and the trial proceeded.

Though the witness appeared specially by counsel for the purpose of his motion to vacate the order, as well as to file his pleas and to object to the trial in his absence, his attorneys appeared and one of them testified, giving the facts in mitigation of his offense.

None of the authorities cited by the petitioner deny the power of Congress to authorize courts to serve their process upon citizens beyond our territorial confines.

We submit that the Congress and the courts ought not to be and are not powerless to serve process upon their citizens when abroad, or to subject their property within the United States to the payment of a fine, which may be assessed because of a flagrant violation of the will of the sovereign.

The government has authority to recall its citizens from abroad for military service.

Why then may not the Congress authorize the court to service notice upon the witness, a citizen of the United States, temporarily sojourning abroad, and compel him to attend court under the terms and conditions set out in the Act of July 3, 1926?

We submit there is no error of the proceedings of the Supreme Court, or the Court of Appeals, of the District of Columbia.

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APPENDIX.

ACT OF JULY 3, 1926.

[PUBLIC—No. 483—69TH CONGRESS]
[S. 1035]

An Act Relating to contempts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever letters rogatory shall issue out of any court of the United States, either with or without interrogatories addressed to any court of any foreign country, to take the testimony of any witness, being a citizen of the United States or domiciled therein, and such witness, having been personally notified by it according to the practice of such court, to appear and testify pursuant to such letters rogatory and such witness shall neglect to appear, or having appeared shall decline, refuse, or neglect to answer to any question which may be propounded to him by or under the authority of such court, to which he would be required to make answer were he being examined before the court issuing such letters, the court out of which said letters issued may upon proper showing order that a subpoena issue addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

SEC. 2. Whenever the attendance at the trial of any criminal action of a witness, being a citizen of the United States or domiciled therein, who is beyond the jurisdiction of the United States, is desired by the Attorney General or any assistant or district attorney acting under him, the judge of the court before which such action is pending, or who is to sit in the trial of the same, may, upon proper showing, order that a subpoena issue, addressed to any consul of the United States within any country in which

such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

SEC. 3. It shall be the duty of any consul of the United States within any country in which such witness may be at the request of the clerk of the court issuing any subpoena under this Act or at the request of the officer causing such subpoena to be issued, to serve the same personally upon such witness and also to serve any orders to show cause, rules, judgments, or decrees when requested by the court or United States marshal, and to make a return thereof to the court out of which the same issued, first tendering to the witness the amount of his necessary expenses in traveling to and from the place at which the court sits and his attendance thereon, which amount shall be determined by the judge on issuing the order for the subpoena and supplied to the consul making the service.

SEC. 4. If the witness so served shall neglect or refuse to appear as in such subpoena directed, the court out of which it was issued shall, upon proof being made of the service and default, issue an order directing the witness to appear before the court at a time in such order designated to show cause why he should not be adjudged guilty of contempt and be punished accordingly.

SEC. 5. Upon issuing such order the court may, upon the giving of security for any damages which the recusing witness may have suffered, should the charge be dismissed (except that no security shall be required of the United States), direct as a part of such order that the property of the recusing witness, at any place within the United States, or so much thereof in value as the court may direct shall be levied upon and seized by the marshal of said court in the manner provided by law or the rule of the court for a levy or seizure under execution, to be held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted.

SEC. 6. The marshal, having made such levy, sha thereupon forward to the consul of any country where th recusing witness may be a copy of the order to show cau why such witness should not be adjudged guilty of co tempt with the request that said consul make service of th same personally upon the recusing witness, and shall cau to be published such order to show cause and for the seque tration of the property of such witness, in some newspap of general circulation in the district within which the cou issuing such order sits, once each week for six consecuti weeks.

SEC. 7. On the return day of such order or any lat day to which the hearing may by the court be continue proof shall be taken; and if the charge of recusan against the witness shall be sustained, the court sha adjudge him guilty of contempt and, notwithstanding a limitation upon the power of the court generally to puni for contempt, impose upon him a fine not exceeding $100,0 and direct that the amount thereof, with the costs of t proceeding, be satisfied, unless paid, by a sale of the pro erty of the witness so seized or levied upon, such sale to conducted upon the notice required and in the manner p vided for sales upon execution.

SEC. 8. Any judgment rendered pursuant to this A upon service by publication only may be opened for a swer within the time and in the manner provided in sect 57 of the Judicial Code.

Approved, July 3, 1926.